United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1414

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

ERNEST MALIZIA,

Appellant

On Appeal From The United States District Court

For The Southern District of New York

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-v-

77-1414

ERNEST MALIZIA,

Appellant.

APPELLANT'S REPLY BRIEF

A. THE PRETRIAL MOTION BY MALIZIA WAS SUFFICIENT TO ALERT THE COURT TO HIS DESIRE TO PROCEED PRO SE.

The pretrial motion made by appellant Malizia requests that his trial counsel be discharged. No inference other than the wish to proceed pro se should be drawn from this motion, as shown by Malizia's specific subsequent request for different appointed counsel to appeal the trial court's denial to this Court. The circumstances reflect that when Malizia desired counsel, he so stated.

It has never been held that a defendant must accompany a pro se request with correct case name and citation. It is enough that a defendant bring to the court's attention, prior to the commencement of the trial proceedings, his wish to proceed in his own behalf. The trial court is thereafter only responsible for providing a full and complete record that the defendant's choice was knowingly made. The use of the phrase "in propria persona" is not merely a "delicate linguistic claim" (government's brief, p. 19), but a signal to a trial court that the defendant is no longer relying on counsel for representation, but now wishes that responsibility to be his, as is his right under Faretta. This signal is reinforced in Malizia's case by his request that trial counsel be discharged. If he requests the discharge of trial counsel and does

not request new trial counsel, a trial court can draw no other inference but that he wishes to proceed pro se.*

The government has contended that since this issue was not part of Malizia's post-trial motions, there has been a waiver. But, the cases cited by the government are inapposite as they involve failure to properly raise issues either pretrial or during trial proceedings. Post-trial motions are not mandatory, as are objections or pretrial motions, and the criteria for granting a Rule 33 motion is "...if required in the interest of justice." Further, the appeal herein involves not just the issue of that motion but all issues related to the judgement of conviction of Malizia.

Finally, the government doubts a pro se request could be granted on the day of trial (government's brief, p. 21, fn *). This ignores the statement by the Court in United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965) that a pro se request is timely after the case had been called on the calendar"...but before the jury had been chosen." See also, United States v. Chapman, 553 F.2d 886 (5th Cir. 1977).

B. A HEARING IS REQUESTED TO DETERMINE IF THE GOVERNMENT'S DUAL PROSECUTION POLICY HAS BEEN VIOLATED.

The government, in response to Malizia's request for a hearing on his charge of selective prosecution or violation of the federal policy against

*The government also contends Malizia requested hybrid representation, but this is not factually accurate. Malizia requested the assistance of other counsel, either professional or layman, not joint representation. Faretta specifically approves of the presence, even over the objection of defendant, of counsel to aid defendant in his self-representation. 422 U.S. at 834 n.46. Moreover, the Tenth Circuit, in United States v. Hill, 526 F.2d 1019, 1024 (10th Cir. 1975) cert. denied. 425 U.S. 940 (1976), has held that hybrid representation is a permissible method of representation.

multiple prosecutions, states that the recent U.S. Supreme Court decision in Rinaldi v. United States, 22 Cr. L 4061 (Nov. 9, 1977) (per curiam) is not relevant.

There has been no showing by the government of "compelling reasons" to justify this multiple prosecution. See, 22 Cr. L 4063, fn. 14. It is clear that the policy is designed to avoid multiple prosecutions, but that Malizia has been made, after the fact, an exception. Without any knowledge of what "compelling reasons" relating to the dual sovereignty principle the government relies on, Malizia is now unable to offer proof of bad faith by the government, but obviously his constitutional right to liberty is at stake. Therefore, Malizia desires a remand for a hearing to ascertain whether or not the government has violated the dual prosecution policy. Clearly, if a violation were shown, the government should provide similar relief as was afforded in Rinaldi and Watts v. United States, 422 U.S. 1032 (1975).

CONCLUSION

FOR THE FOREGOING REASONS, THE RELIEF REQUESTED SHOULD BE GRANTED.

Respectfully submitted,

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